

Office of the Attorney General State of Texas

DAN MORALES
ATTORNEY GENERAL

February 4, 1998

Ms. Linda Wiegman Supervising Attorney Office of General Counsel Texas Department of Health 1100 West 49th Street Austin, Texas 78756-3199

OR98-0337

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 112103.

The Texas Department of Health (the "department") received a request for "any reports generated from licensure site surveys performed from 1/1/90 through the present," concerning the Wilson N. Jones Memorial Hospital. You have submitted the information which you contend is responsive to the request. You indicate that "[i]nformation that is not noted or highlighted has already been released to the requestor." However, you claim that some of the requested information, which you have marked, is protected from public disclosure by section 552.101 of the Government Code, in conjunction with section 5.08, article 4495b, V.T.C.S., section 48.101 of the Human Resources Code, and section 611.002 of the Health and Safety Code. We have considered the arguments you have raised and have reviewed the submitted information.

You indicate that the department received the request on October 15, 1997, however, the department did not request a decision from this office until November 3, 1997. Section 552.301 of the Government Code provides that a governmental body must ask the attorney general for a decision as to whether requested documents must be disclosed not later than the tenth business day after the date of receiving the written request. Therefore, we conclude that the department failed to meet its ten-day deadline for requesting an opinion from this office.

When a governmental body fails to request a decision within ten days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ);

Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. See id. Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 (1977) at 2.

We conclude that compelling reasons do exist for withholding the requested information under section 552.101, which excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. This section also encompasses information protected by other statutes.

We first address your argument that section 48.101 of the Human Resources Code applies to some of the requested documents. Chapter 48 of the Human Resources Code sets out guidelines for the investigation of abuse, exploitation, or neglect of an elderly or disabled person. Hum. Res. Code § 48.001. Section 48.101(a) provides that a report of abuse, neglect, or exploitation, the identity of the person making the report, and all files, reports, records, communications, and working papers used or developed in an investigation under chapter 48 are confidential. You state that some of the submitted documents are "files, reports, records, communications, and working papers" used or developed in an investigation of alleged abuse or neglect. We agree that some of the submitted information, which we have marked, is made confidential under section 48.101 of the Human Resources Code. Therefore, this information must be withheld in its entirety.

We next address section 5.08 of V.T.C.S. article 4495b, the Medical Practice Act (the "MPA"), which applies to "[c]ommunications between one licensed to practice medicine, relative to or in connection with any professional services as a physician to a patient" and "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." The submissions contain information that appears to have been obtained from certain medical records and communications. This information, which we have marked, is confidential and may be disclosed only in accordance with the MPA. See V.T.C.S. art. 4495b, § 5.08(a), (b), (c), (j); Open Records Decision No. 598 (1991).

Section 611.002 of the Health and Safety Code, which pertains specifically to mental health patients, applies to "[c]ommunications between a patient and a professional, [and] records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional." See also Health and Safety Code § 611.001 (defining "patient" and "professional"). The submissions contain information that appears to have been obtained from a professional's records and communications. We have marked the type of information that you must withhold under section 611.002 of the Health and Safety Code, which may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Health and Safety Code § 611.002(b); see id. §§ 611.004, 611.0045.

Section 552.101 of the Government Code also applies to information made confidential by the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *See id.* While common-law privacy may protect an individual's medical history, it does not protect all medically related information. *See* Open Records Decision No. 478 (1987). Individual determinations are required. *See* Open Records Decision No. 370 (1983). We find that the remaining information is not protected from disclosure under the common-law right to privacy and must be released.

As a summary, we note that the submitted documents must be withheld pursuant to our markings and the relevant exceptions. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly

Sam Haddad

Assistant Attorney General Open Records Division

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SH/glg

Ref.: ID# 112103

Enclosures: Marked documents

cc: Mr. Robert Schwab

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(w/o enclosures)